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8 **UNITED STATES DISTRICT COURT**

9 **NORTHERN DISTRICT OF CALIFORNIA**

10 LD, DB, BW, RH, and CJ on behalf of  
11 themselves and all others similarly situated,

12 Plaintiffs,

13 vs.

14 UNITED BEHAVIORAL HEALTH, INC., a  
California Corporation,  
15 UNITEDHEALTHCARE INSURANCE  
COMPANY, a Connecticut Corporation, and  
16 MULTIPLAN, INC., a New York  
Corporation,

17 Defendants.  
18

Case No. 4:20-cv-02254-YGR-JCS  
(Hon. Yvonne Gonzalez Rogers)

**DEFENDANT MULTIPLAN, INC.'S  
EMERGENCY ADMINISTRATIVE  
MOTION FOR STAY OF DISCOVERY  
ORDER PENDING REVIEW AND FOR  
AN ADMINISTRATIVE STAY  
PENDING DECISION ON MOTION TO  
STAY**

Date: TBD  
Time: TBD  
Ctrm: 1  
Location: 1301 Clay Street, Oakland, CA  
Judge: Hon. Yvonne Gonzalez Rogers

Pursuant to Local Rule 7-11, Defendant MultiPlan, Inc. (“MultiPlan”) hereby moves this Court for an emergency stay of Magistrate Judge Spero’s Order of December 2, 2022 (ECF No. 266) (“the December 2<sup>nd</sup> Order”) pending this Court’s review. MultiPlan respectfully requests an immediate order granting the stay, or, in the alternative, an administrative stay of the December 2<sup>nd</sup> Order pending a decision on this motion to stay.

## **I. INTRODUCTION**

Plaintiffs contend that MultiPlan failed to justify its assertions of privilege with regard to certain documents withheld from production and described in MultiPlan’s revised privilege log. Following numerous meet-and-confer efforts and submissions, on December 2, 2022, Magistrate Judge Spero determined that MultiPlan had waived all attorney-client privilege and work product protection for the documents listed in its revised Privilege Log privilege log, and ordered MultiPlan to produce all of the documents on the log by no later than December 16, 2022. (ECF No. 266, at p. 33). MultiPlan is disputing this finding, as well as Judge Spero’s other adverse determinations on multiple grounds, including his erroneous determination to apply the “fiduciary exception” to the attorney-client privilege claims when MultiPlan has been found not to be an ERISA fiduciary, *see In re: Out of Network Substance Use Disorder Claims against UnitedHealthcare*, No. 819CV02075JVSDFMX, 2022 WL 17080378, at \*6 (C.D. Cal. Oct. 14, 2022); his application of the “primary purpose” doctrine to MultiPlan’s privilege claims when that issue is presently before the United States Supreme Court for review, *see In re: Grand Jury*, No. 21-1397 (U.S. Sup. Ct., *cert. granted*, October 3, 2022, *to be argued* January 9, 2023); and his rejection of work product immunity claims for materials prepared for an ongoing, confidential government investigation. These substantive issues, as well as his failure to hold a hearing and allow further supplementation of MultiPlan’s support for its claims, permit oral argument, or require plaintiffs to meet their evidentiary burdens, *see United States v. Mett*, 178 F.3d 1058, 1062-66 (9<sup>th</sup> Cir. 1999), all justify this Court’s granting a stay to avoid MultiPlan’s losing its privilege and work product immunity without sufficient time for the Court to consider them.

Judge Spero’s December 2<sup>nd</sup> Order addresses hotly disputed legal issues involving the application of the attorney-client privilege and attorney work product protections. MultiPlan is filing

1 objections to the December 2<sup>nd</sup> Order pursuant to Federal Rule of Civil Procedure 72 concurrently  
 2 with this motion for an emergency stay. However, given the December 2<sup>nd</sup> Order's impending  
 3 deadline of December 16 to produce certain documents over which MultiPlan claims privilege, this  
 4 Court's intervention is warranted.<sup>1</sup>

## 5 **II. JUSTIFICATION FOR A STAY**

6 MultiPlan requests an emergency stay of the December 2<sup>nd</sup> Order to allow for meaningful  
 7 review of its objections. Absent a stay, MultiPlan will be effectively denied the right to seek relief.  
 8 That fact alone justifies granting a stay pending review of its Rule 72 objections. *See Alvarez v.*  
 9 *Larose*, No. 2020 WL 5632659, at \*2 (S.D. Cal. Sept. 21, 2020) (granting a stay because denying it  
 10 "might preclude the district judge's ability to review [movants'] anticipated Rule 72 objection" and  
 11 "effectively deprive [movants] of their right to reconsideration of the Discovery Order by the district  
 12 judge altogether"); *see also Gamino v. KPC Healthcare Holdings, Inc.*, 2021 WL 2309972, at \*1  
 13 (C.D. Cal. May 10, 2021) (granting a stay in part because "absent a stay [movants] would be  
 14 deprived of any meaningful right to reconsideration of the discovery order by this Court").

15 A motion to stay the effect of a magistrate judge's order pending Rule 72 objections "is akin  
 16 to a motion for stay pending appeal." *In re Republic of Ecuador*, 2012 WL 13187177, at \*2 (N.D.  
 17 Cal. Mar. 30, 2012). Therefore, when considering motions to stay the effect of a magistrate judge's  
 18 non-dispositive order, this Court applies the same four-factor test that applies to a stay of a district  
 19 court's order pending appellate review. *Id.*; *see also Alvarez*, 2020 WL 5632659, at \*2. Those  
 20 factors are: "(1) whether the movant has made a showing of likelihood of success on the merits; (2)  
 21 whether the movant has made a showing of irreparable injury if the stay is not granted; (3) whether  
 22 the granting of the stay would substantially harm the other parties; and (4) whether the granting of  
 23 the stay would serve the public interest." *Alvarez*, 2020 WL 5632659, at \*2.

24  
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 26  
 27 <sup>1</sup> MultiPlan is seeking this Court's intervention directly because this Court will address the  
 28 December 2<sup>nd</sup> Order's merits in ruling on MultiPlan's Rule 72 objections, which are being filed  
 concurrently with this emergency motion. The request for a stay and the objections are intertwined,  
 particularly given the short window for complying with the December 2<sup>nd</sup> Order.

1 “[I]n the stay context,” courts in this circuit adopt a “flexible approach” to the four-factor  
 2 test, balancing them on a “sliding scale.” *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011).  
 3 The Court may thus order a stay if there are “serious questions” going to the merits and “the balance  
 4 of hardships tips sharply in [the movant’s] favor.” *Id.*; *see also Apple Inc. v. Samsung Elec. Co.*,  
 5 2015 WL 13711858, at \*1 (N.D. Cal. Apr. 7, 2015).

6 That test is easily satisfied here. The balance of hardships overwhelmingly favors a stay. The  
 7 harm MultiPlan would suffer from complying with the December 2<sup>nd</sup> Order before review can occur  
 8 is significant and irreversible. By contrast, the harm to Plaintiffs of staying the December 2<sup>nd</sup> Order  
 9 pending review is minimal to none. Similarly, the public interest strongly supports a stay. And  
 10 MultiPlan’s objections to the December 2<sup>nd</sup> Order raise significant questions going to the heart of  
 11 the attorney-client privilege’s application and the merits of the December 2<sup>nd</sup> Order.

12 ***A. The balance of hardships strongly favors a stay because MultiPlan will suffer***  
 13 ***irreparable harm if it has to disclose privileged materials.***

14 There is no denying that MultiPlan will suffer irreparable injury if it is forced to comply with  
 15 the December 2<sup>nd</sup> Order. Disclosure of privileged materials and communications is a textbook  
 16 example of harm that cannot be undone: Once the privileged documents are surrendered,  
 17 confidentiality is lost forever. *See Hernandez v. Tanninen*, 604 F.3d 1095, 1101 (9th Cir. 2010); *see*  
 18 *also Senate Permanent Subcomm. on Investigations v. Ferrer*, 856 F.3d 1080, 1088-89 (D.C. Cir.  
 19 2017) (finding challenge to subpoena-enforcement order to be moot following disclosure of  
 20 privileged documents); *In re BankAmerica Corp. Sec. Litig.*, 270 F.3d 639, 641 (8th Cir. 2001)  
 21 (issuing a writ of mandamus directing vacatur of stayed disclosure order because “an appeal after  
 22 disclosure of the privileged communication is an inadequate remedy” (internal quotation marks and  
 23 citation omitted)). Put simply, the status quo could not be restored. The “privilege[] ... would be  
 24 irreparably harmed if the information in question were released prior to an appeal.” *Connaught*  
 25 *Labs., Inc. v. SmithKline Beecham PLC*, 165 F.3d 1368, 1370 (Fed. Cir. 1999) (cited by Samsung,  
 26 2015 WL 13711858, at \*1). The magnitude of this injury alone justifies a stay.

27 What is more, denying MultiPlan the right to seek relief from the December 2<sup>nd</sup> Order is  
 28 itself an irreparable harm. *See Samsung*, 2015 WL 13711858, at \*1 (characterizing denial of

1 meaningful right to seek relief of order compelling production of attorney-client privileged material  
 2 as an irreparable injury for purposes of granting a stay). Indeed, the very “purpose of [a] stay  
 3 proceeding” “is to preserve critical rights from being lost irretrievably pending objections or to  
 4 maintain the status quo when a close question of law is involved in [a] nondispositive matter.”  
 5 *Dayco Prod., Inc. v. Walker*, 142 F.R.D. 450, 454 (S.D. Ohio 1992).

6 On the other side of the scale, a stay pending review would not cause Plaintiffs significant  
 7 injury. If MultiPlan is successful in challenging the December 2<sup>nd</sup> Order, Plaintiffs will suffer no  
 8 harm at all; they simply will not receive privileged material to which they will have had no right.  
 9 See *Samsung*, 2015 WL 13711858 at \*1; see also *id.* at \*2 (noting that Apple did not oppose  
 10 Samsung’s stay motion). And if MultiPlan loses its challenge, Plaintiffs’ only injury would be “a  
 11 short delay,” which ““does not constitute substantial harm.”” *Id.* (quoting *United States v. Philip*  
 12 *Morris*, 314 F.3d 612, 622 (D.D.C. 2003), *abrogated on other grounds by Mohawk Indus., Inc. v.*  
 13 *Carpenter*, 558 U.S. 100, 104 n.1 (2009)). Balanced against the outsized and irreparable harm to  
 14 MultiPlan absent a stay, the insignificant potential harm to Plaintiffs pales in comparison.

15 ***B. The public interest favors a stay.***

16 As the *Samsung* court recognized, “[t]he attorney-client privilege advances ‘broader public  
 17 interests in the observance of law and administration of justice,’” and those broader interests weigh  
 18 in favor of staying the disclosure of privileged materials pending review. 2015 WL 13711858 at \*2  
 19 (quoting *Upjohn Co. v. United States*, 448 U.S. 383, 389 (1981)). “The privilege recognizes that  
 20 sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon  
 21 the lawyer’s being fully informed by the client.” *Upjohn*, 448 U.S. at 389.

22 Compelled disclosure of privileged information in an order that is contrary to law  
 23 undermines those public ends by eroding trust in the ability to rely on the privilege. A stay preserves  
 24 the sanctity of the privilege while its precise—and highly disputed—contours are determined by the  
 25 presiding judge and, potentially, an appellate court.

26 ***C. MultiPlan will likely succeed on the merits of its objections.***

27 In addition to the overwhelming balance of hardships and public interest favoring a stay,  
 28 MultiPlan has a strong likelihood of prevailing on the merits. The December 2<sup>nd</sup> Order presents

1 important questions of law regarding the scope and application of the attorney-client privilege. As  
2 explained in the concurrently-filed Motion for Relief, Magistrate Judge Spero made numerous  
3 factual and legal errors in the December 2<sup>nd</sup> Order, including: (1) that MultiPlan did not comply  
4 with Magistrate Judge Spero's prior order dated October 3, 2022 (when in fact it did); (2) that  
5 MultiPlan is an ERISA fiduciary (which other courts have found it is not); and (3) that documents  
6 created for or in connection with a government investigation are not afforded work product  
7 immunity (when in fact they are). (See MultiPlan's concurrently filed Motion for Relief). MultiPlan  
8 believes that, for the reasons detailed in the concurrently filed Motion (which it will not repeat here),  
9 this Court will grant the Motion and set aside Magistrate Judge Spero's December 2<sup>nd</sup> Order.

10 For these reasons, MultiPlan respectfully requests that the Court grant this Emergency  
11 Motion and stay Magistrate Judge Spero's December 2<sup>nd</sup> Order pending this Court's review of  
12 MultiPlan's Rule 72 Motion for Relief, or, alternatively, administratively stay Magistrate Judge  
13 Spero's December 2<sup>nd</sup> Order pending a decision on the Emergency Motion.

1 DATED: December 14, 2022

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